

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18011426
STEPHON N. BROWN)
) Date Issued: August 12, 2019
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OPINION

Representing the Parties:

For Appellant: Stephon N. Brown¹
For Respondent: Joel M. Smith, Tax Counsel

A. ROSAS, Administrative Law Judge: Under California Revenue and Taxation Code (R&TC) section 19324, appellant Stephon N. Brown (Brown) appeals respondent Franchise Tax Board’s (FTB) denial of his claims for refund for \$1,945.82² (2010) and \$3,590.56³ (2011). Brown waived his right to an oral hearing, and therefore we decide this matter based on the written record.

ISSUES

1. Did Brown demonstrate error in FTB’s federally-based 2010 and 2011 assessments?
2. Did Brown establish that his failure to timely pay his total 2010 California incometax liability was due to reasonable cause and not willful neglect?
3. Did Brown show that he qualifies for interest abatement for 2010 and 2011?

¹ Although Brown prepared his own appeal letter dated February 6, 2015, the Tax Appeals Assistance Program (TAAP) at Loyola Law School subsequently provided assistance to Brown. TAAP student Daniel Rowe wrote Brown’s Response Brief dated December 26, 2017. As of August 24, 2018, TAAP student Jake Davis served as Brown’s new representative. However, TAAP’s representation ceased on November 28, 2018.

² This amount includes additional tax (\$1,548), a late-payment penalty (\$47.77), interest (\$196.05), and a collection cost recovery fee (\$154).

³ This amount includes additional tax (\$3,074) and interest (\$516.56).

4. Does the Office of Tax Appeals (OTA) have jurisdiction to review FTB's imposition of the collection cost recovery fee for 2010; and, if so, was the fee properly imposed?

FACTUAL FINDINGS

Tax Year 2010

1. Brown timely filed his California Resident Income Tax Return (Form 540) for 2010. After applying exemption credits, Brown reported a \$1,292 tax. After applying a \$700 withholding credit, Brown reported a tax due of \$592.
2. In early March 2011, Brown attempted to make an electronic payment towards the balance due FTB, but the payment was dishonored due to insufficient funds. On or about April 15, 2011, Brown made a \$30 payment. FTB imposed a late-payment penalty on the remaining balance. When Brown did not pay the remaining balance due, FTB initiated collection activity and imposed a collection cost recovery fee (Fee) of \$154.⁴
3. Brown submitted additional payments of \$792.29 in November 2011 and \$8.42 in December 2011, thus paying his 2010 account in full.
4. FTB subsequently received information from the Internal Revenue Service (IRS): based on Brown's receipt of unreported income (an early retirement distribution) of \$13,804, the IRS determined a tax deficiency against him. Based on the IRS action, FTB added \$13,804 to Brown's California income and added a \$327 premature distribution tax. FTB issued a Notice of Proposed Assessment (NPA) in July 2014, proposing total additional tax of \$1,548 plus interest.
5. When Brown did not protest the NPA, it went final. In November 2014, FTB issued an Income Tax Due Notice with a balance due of \$1,718.99. Brown did not pay this balance by the December 3, 2014 due date.⁵
6. On March 6, 2015, per Brown's request, FTB applied \$1,960.77 from his 2014 overpayment to the 2010 balance, thus satisfying this account balance in full.

⁴ It is unclear when FTB imposed this \$154 Fee. Moreover, FTB did not provide a copy of the notice that predated FTB imposing this Fee.

⁵ After Brown failed to pay the balance due, FTB imposed a second Fee for \$194; however, FTB has withdrawn this \$194 Fee, and it is not at issue in this appeal.

Tax Year 2011

7. Brown timely filed his Form 540 for 2011. After applying exemption credits, Brown reported zero tax. After applying a \$1,563 withholding credit, Brown reported an overpayment of \$1,563. FTB refunded this overpayment.
8. The IRS audited Brown's 2011 federal income tax return, proposed adjustments, and, in July 2014, provided to FTB information about the adjustments. The IRS adjustments increased Brown's taxable income by \$54,402. Based on this federal information, FTB sent an NPA to Brown in April 2015, proposing additional tax of \$3,074 plus interest.
9. Brown did not protest the NPA; it went final. In August 2015, FTB issued an Income Tax Due Notice reflecting a balance due of \$3,407.04. Brown did not pay this balance by the September 9, 2015 due date, and FTB initiated collection action.

Claim for Refund (2010) and Request for Abatement (2011)

10. Brown requested abatement of the 2010 and 2011 penalties and interest. Because Brown had paid the 2010 balance in full, FTB considered the request a claim for refund. FTB denied Brown's claim for refund for 2010. FTB also denied Brown's request for abatement of interest for 2011.⁶
11. Brown filed this timely appeal in February 2015. When Brown filed his appeal, the tax year 2011 issue only concerned FTB's denial of his request for waiver of interest. However, on April 19, 2017, FTB intercepted a federal payment and applied the funds to Brown's 2011 account balance, thereby converting the request for waiver of interest into a claim for refund.
12. Nowhere in his request for abatement of the penalties and interest for 2010, or in his appeal letter, does Brown discuss whether FTB imposed the \$154 Fee improperly. He believed that FTB "proposed to waive" this Fee.⁷ However, FTB stated that it did not propose to waive this \$154 Fee.

⁶ In January 2017, a year after Brown filed this appeal, FTB sent him a notice (Intent to Offset Federal Payments). On April 19, 2017, FTB intercepted a federal payment of \$3,606.66 and charged a \$22 U.S. Treasury Offset Program fee. FTB applied these funds to the 2011 account balance and zeroed out his balance.

⁷ In Brown's Reply Brief, he stated "that respondent has proposed to waive the collection cost recovery fee - \$154 paid for 2010" In a memorandum to OTA (Request for Permission to File Reply Brief), FTB described this as "appellant's mistaken belief that" FTB conceded this Fee.

DISCUSSION

Issue 1 – Did Brown demonstrate error in FTB’s federally-based 2010 and 2011 assessments?

A taxpayer shall either concede the accuracy of a federal determination or state how it is erroneous. (R&TC, § 18622(a).) Under well-settled law, a deficiency assessment based on a federal audit report is presumptively correct and that a taxpayer bears the burden of proving that the determination is erroneous. (*Appeal of Brockett* (86-SBE-109) 1986 WL 22731; *Appeal of Hutchinson* (82-SBE-121) 1982 WL 11798.) Generally, the applicable burden of proof is by a preponderance of the evidence. (Evid. Code, § 115; *Appeal of Estate of Gillespie*, 2018-OTA-052P, at p. *4.) That is, a party must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602, 622.) However, unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof with respect to an assessment based on a federal action. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.)

The undisputed facts show that for 2010, FTB received information from the IRS that Brown had received \$13,804 in additional, unreported income from a premature retirement account distribution. The undisputed facts also show that for 2011 the IRS’s adjustments increased Brown’s taxable income by \$54,402. FTB proposed adjustments consistent with the IRS’s audit determination. Brown does not concede the accuracy of the IRS’s determinations. But he also does not prove that the determinations are erroneous. He merely stated that he disagreed with the NPAs. However, a mere disagreement, like an unsupported assertion, is not sufficient to satisfy his burden of proof.

Therefore, Brown has not demonstrated error in FTB’s assessments.

Issue 2 – Did Brown establish that his failure to timely pay his total 2010 California income tax liability was due to reasonable cause and not willful neglect?

The law requires FTB to impose a late-payment penalty when a taxpayer fails to pay the amount due by the due date, unless the taxpayer establishes that the late payment was due to reasonable cause and not willful neglect. (R&TC, § 19132.) The taxpayer bears the burden of proving both conditions existed. (*Appeal of Friedman*, 2018-OTA-077P.) The taxpayer must show that the failure to timely pay the amount due occurred despite the exercise of ordinary

business care and prudence. (*Ibid.*) The reason for not timely paying the tax due must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Ibid.*) The failure to timely remit the balance due on a tax liability caused by an oversight does not, by itself, constitute reasonable cause. (*Ibid.*)

Brown did not pay the amount due by the due date. For example, he neglected to pay \$562 of the \$592 tax reported on his 2010 Form 540 by the due date.⁸ Additionally, although Brown attempted an electronic payment in March 2010, the payment was dishonored due to insufficient funds. Thus, under R&TC section 19132, FTB imposed a \$47.77 late-payment penalty.

There are three reasons why Brown failed to establish that his late payment was due to reasonable cause and not willful neglect. First, Brown did not present any evidence to attempt to show that his failure to pay his reported tax liability in full by the due date occurred despite the exercise of ordinary business care and prudence. Second, although he claims he relied on “professional advice,” the evidence suggests that Brown self-prepared his 2010 tax return. Finally, other than making a vague and general claim of reliance on an unidentified enrolled agent, Brown did not show the specific reason(s) for his failure to pay his reported tax liability in full by the due date. For example, even if Brown did rely on “professional advice,” he did not explain how this advice, or his reliance on such advice, resulted in his insufficient funds. And he did not explain how the “professional advice,” or his reliance on such advice, caused him to pay only \$30 towards his reported 2010 liability, thereby underpaying this liability by \$562.

Issue 3 – Did Brown show that he qualifies for interest abatement for 2010 and 2011?

Tax is due on the return’s original due date without regard to any filing extension. (R&TC, § 18567.) If a taxpayer does not pay the tax by the original due date, or if FTB assesses additional tax, the law provides for charging interest on the balance due. (R&TC, § 19101.) Interest is mandatory, and FTB cannot abate interest except where authorized by law. (*Appeal of Yamachi* (77-SBE-095) 1977 WL 3905.) Interest is not a penalty; it is compensation for the use of money. (*Appeal of Jaegle* (76-SBE-070) 1976 WL 4086.)

Brown asserts that he qualifies for interest abatement under R&TC section 19112, which requires a showing of extreme financial hardship caused by a significant disability or other

⁸ FTB did not impose the penalty on the additional tax due under the NPA.

catastrophic circumstance. Unlike R&TC section 19104, there is no provision in R&TC section 19112 or other law that gives OTA jurisdiction to review an FTB determination as to whether R&TC section 19112 applies. (*Appeal of Moy*, 2019-OTA-057P.) Thus, we do not have the authority to review FTB’s denial of a waiver of interest based on extreme financial hardship, and Brown has shown no basis to abate interest.

Issue 4 – Does OTA have jurisdiction to review FTB’s imposition of the Fee for 2010; and, if so, was the Fee properly imposed?

Brown did not contest FTB’s imposition of the Fee in his refund claim. But even if a taxpayer does not raise a particular issue in a refund claim, it is sufficient that the tax agency has actual notice of a taxpayer’s position. (*Wallace Berrie & Co. v. State Bd. of Equalization* (1985) 40 Cal.3d 60; *J.H. McKnight Ranch, Inc. v. Franchise Tax Bd.* (2003) 110 Cal.App.4th 978.)⁹ The tax agency’s subsequent conduct may demonstrate that it was aware of the issue. (*Wallace Berrie & Co., supra.*)

First, we look for the existence of actual notice of Brown’s position on the Fee issue. For 2010, Brown requested abatement of the penalties and interest. Because he had paid the 2010 balance in full, FTB considered the request a claim for refund. But neither his claim for refund nor his appeal letter discussed whether FTB imposed the \$154 Fee improperly. However, Brown’s silence on the issue may come as no surprise. After all, as he suggested in his reply brief, he believed that FTB proposed to waive this Fee.

Second, we look at FTB’s subsequent conduct and whether such conduct demonstrated FTB’s awareness of the Fee issue. FTB’s opening brief enumerated four issues, and the fourth issue concerned the Fee. That brief makes FTB’s position clear: that FTB properly imposed this

⁹ In *Wallace Berrie & Co.*, the California Supreme Court concluded that the refund claim at least “indirectly” raised the issue challenging a regulation and the court stated: “Moreover, any question as to whether the refund claim actually raised the issue . . . was dispelled by the Board’s subsequent trial stance.” (*Wallace Berrie & Co., supra*, 40 Cal.3d at p. 66, fn. 2.) “Although Berrie’s refund claim might have been drafted with greater clarity, it appears that the Board was well aware that Berrie was challenging the validity of” that regulation. (*Ibid.*) Here, too, it appears that Brown’s refund claim and appeal pleadings might have been drafted with greater clarity. But he should not be penalized for this. After all, he believed that FTB proposed to waive the \$154 Fee. R&TC section 19322 “requires no particular form; the claim only must be in writing and state the grounds therefor. Indeed, the purpose of the statute is to put the board on notice of a claim . . . [Citation.]” (*J.H. McKnight Ranch, Inc., supra*, 110 Cal.App.4th at p. 986.) Notice to FTB “does not hinge on whether a particular issue is recited expressly in the initial claim for refund. If [FTB] has notice of the taxpayer’s argument from whatever source during the course of resolving the claim for refund, it has the opportunity to reevaluate its position, [and] reach the correct result . . .” (*Id.* at pp. 986-987.) Thus, there is no basis “to ignore actual notice the [FTB] may have had from sources other than the four corners of the initial claim.” (*Id.* at p. 987.)

Fee. Additionally, in a memorandum to OTA, FTB requested permission to file a reply brief because, among other matters, FTB specifically wanted “to address appellant’s mistaken belief that the respondent has conceded” the Fee. In its reply brief, FTB stated that Brown was mistaken because FTB did not waive this Fee. And FTB restated its position: that it properly imposed this Fee.

Accordingly, the evidence and the pleadings show that FTB had actual notice of this issue, and FTB’s subsequent conduct demonstrates FTB’s awareness that Brown’s claim included this issue. And there is no question OTA has jurisdiction to decide a claim for refund. (R&TC, § 19333; Cal. Code of Regs., tit. 18, § 30101(a).)

With the Fee issue appropriately before us, we now consider whether FTB properly imposed this Fee. Under the applicable law, if a taxpayer “fails to pay any amount of tax, penalty, addition to tax, interest, or other liability . . . a collection cost recovery fee shall be imposed if the Franchise Tax Board has mailed a notice to that person for payment that advises that the continued failure to pay the amount due may result in a collection action, including the imposition of a collection cost recovery fee.” (R&TC, § 19254(a).) Furthermore, once properly imposed, there is no reasonable cause exception or any other provision in the statute allowing for relief from FTB’s imposition of this Fee. (*Appeal of Myers* (2001- SBE- 001) 2001 WL 37126924.)

The facts show why FTB imposed this Fee. On Brown’s 2010 Form 540, he reported a \$592 tax due. His March 2011 electronic payment was dishonored due to insufficient funds. Then, in mid-April 2011, he paid only \$30. FTB imposed a late-payment penalty, initiated collection activity, and imposed the \$154 Fee.

Although the reason is clear, the timing is not as clear. It is unclear when FTB imposed this \$154 Fee. Based on the evidentiary record, prior to the July 2014 NPA, there is no evidence that FTB mailed a notice to Brown for payment of the 2010 balance due (\$562 + late-payment penalty + interest). There is no evidence that FTB mailed Brown the required notice advising Brown that his continued failure to pay the amount due may result in a collection action, which may include FTB imposing the Fee.¹⁰

¹⁰To be clear, the evidentiary record does include two Income Tax Due Notices. The November 2014 Income Tax Due Notice led to FTB’s imposition of a second Fee for 2010 in the sum of \$194; however, FTB withdrew this \$194 Fee, and it is not at issue in this appeal. The other Income Tax Due Notice (August 2015) concerns 2011 and is not at issue in this appeal.

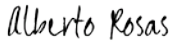
Therefore, based on the absence of this statutorily-required written notice, we determine that FTB has not properly imposed the Fee.

HOLDINGS


1. Brown failed to demonstrate error in FTB’s assessments.
2. Brown did not prove that he is entitled to abatement of the late-payment penalty imposed against him for 2010.
3. OTA does not have the authority to review FTB’s denial of a waiver of interest based on extreme financial hardship, and Brown has shown no basis to abate interest for 2010 and 2011.
4. OTA has jurisdiction to review FTB’s imposition of the Fee for 2010, and it was not properly imposed.


DISPOSITION

Sustained in part and denied in part: we grant Brown relief from the imposition of the \$154 Fee, and we sustain the remainder of FTB’s actions.

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 Alberto T. Rosas
 Administrative Law Judge

We concur:

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 Tommy Leung
 Administrative Law Judge

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 Neil Robinson
 Administrative Law Judge